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No. 97-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

CEASAR WRIGHT

Petitioner,

v.

UNIVERSAL MARITIME SERVICE CORP.;
STEVENS SHIPPING & TERMINAL COMPANY;
STEVEDORING SERVICES OF AMERICA;
RYAN-WALSH, INC.;
STRACHAN SHIPPING COMPANY;
CERES MARINE TERMINALS, INC.; and
SOUTH CAROLINA STEVEDORES ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the court below correct in holding -- contrary to this Court's decisions in *Alexander v. Gardner-Denver Co.* and other cases, and contrary to seven other circuits -- that a general arbitration clause in a collective bargaining contract bars an employee covered by the contract from filing his own lawsuit under a federal anti-discrimination statute?

PARTIES

The parties are all shown in the caption. None of the corporate Respondents is a publicly held corporation or a subsidiary of a publicly held corporation, according to disclosures filed by Counsel for Respondents in the court below.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is unreported. It is referenced in a Table at 121 F.3d 702 (July 29, 1997), and is reprinted at App. 1a.

The Order of the United States District Court for the District of South Carolina, dated September 25, 1996, is unreported, and is reprinted at App. 6a. That Order adopted the ruling recommended by a Magistrate Judge in a Report dated June 14, 1996, reprinted at App. 19a. The further Order of the District Court, dated December 5, 1996, is reprinted at App. 14a.

The decision of the United States Court of Appeals for the Fourth Circuit in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied,* 117 S.Ct. 432 (1996), on which the courts below relied without discussion, is reprinted, for convenient reference, at App. 34a.

JURISDICTION

The Opinion of the United States Court of Appeals for the Fourth Circuit was dated July 29, 1997. The time period for filing the Petition for Writ of Certiorari was extended through November 26, 1997, by Order of Chief Justice Rehnquist entered on October 16, 1997. This Court's certiorari jurisdiction arises under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This matter involves the enforcement of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* The pertinent portions of the Act, particularly 42 U.S.C. §§ 12117 (adopting 42 U.S.C. § 2000e-(f)), 12212, are printed at App. 27a.

STATEMENT OF THE CASE

Petitioner was regularly employed as a longshoreman in the Port of Charleston, beginning in 1970, through the hiring hall operated by Local 1422, International Longshoreman's Association, AFL-CIO. In early 1992, while working for respondent Stevens Shipping, petitioner fell off the top of a freight container, shattering his right heel and injuring his back. These injuries disabled him from waterfront employment for an extended period. He was examined by several physicians, who offered different opinions. His treating physician thought petitioner would probably be permanently and totally disabled from longshore employment, while other physicians expressed the opinion that petitioner could return to longshore employment. Stevens Shipping, relying on these latter opinions, stopped paying disability benefits in 1993. (JA 203).

In May, 1994, Petitioner entered a final settlement in which he compromised his workers compensation claims, including all claims for total permanent disability, for $250,000. App. at 3a. Although substantial, this settlement did not compensate Petitioner for total permanent disability. The settlement for permanent periodic disability payments was stipulated to be only $312.13 per month compared to his compensation rate of $3,033.16 per month (JA 199).

Stevens Shipping, in compromising the claim, refused to agree that Petitioner was totally and permanently disabled. No tribunal found Petitioner totally and permanently disabled.

A major factor in petitioner's physical disability was a bony spike in his right heel that made walking extremely painful. Petitioner's physician expected this condition to be permanent, but in late 1994 the bony spike spontaneously resorbed. Petitioner's physician documented this improvement and found that petitioner was physically able to return to work.

In January 1995, petitioner returned to the hiring hall to seek assignments for work. On nine of the ten days from January 2 through January 11, 1995, petitioner was referred for employment by Local 1422, ILA, and worked for four of the respondent employers during those nine days. Each of these respondents accepted Petitioner as qualified for his position, and none had any complaints about his work performance. App. at 21a. Some of these Respondents asked for written approval from petitioner's treating physician for Petitioner to return to work, and this was provided.

On January 11, 1995, the Respondent Employers agreed among themselves that they would all refuse to accept Petitioner for work. In virtually identical letters to the president of Local 1422, ILA, the Respondents stated that Petitioner was previously "certified as permanently and totally disabled." They continued that "once an individual is certified as permanently and totally disabled, he is no longer qualified to perform longshore work of any kind."

Petitioner immediately consulted with the president of Local 1422, ILA, his bargaining representative. The local union president wrote to the Respondents to protest that the refusal to accept Petitioner for work was a violation of the Americans with Disabilities Act and of the terms of the Collective Bargaining Agreement. The union president did not file a grievance for Petitioner under the Collective Bargaining Agreement; instead, he advised Petitioner to retain private counsel to pursue a statutory claim under the Americans with Disabilities Act. By the time Petitioner located counsel, a grievance under the Bargaining Agreement was "out of time."

The Collective Bargaining Agreement did not refer to the Americans with Disabilities Act nor to any other federal statute prohibiting employment discrimination. Rather, the phrasing of the Agreement said it covered "all matters affecting wages, hours, and other terms and conditions of employment," and the grievance and arbitration procedure applied to "matters under dispute between the parties." The Agreement was adopted effective November 30, 1990, before this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The Agreement had never been applied to any worker's federal statutory claim of employment discrimination.

Petitioner promptly invoked his statutory rights by filing timely charges of discrimination with the Equal Employment Opportunity Commission (EEOC) against all Respondents. After the EEOC issued a Notice of Right to Sue on each charge, Petitioner filed this action in January, 1996.

Two months later, the United States Court of Appeals for the Fourth Circuit issued its opinion in the case of *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. March 12, 1996), *cert. denied*, ___U.S. ___, 117 S.Ct. 432 (1996), which held that an applicable labor arbitration agreement "ousts a court of jurisdiction" to hear statutory claims of discrimination brought by individual employees. Petitioner then offered to arbitrate, but Respondents refused.

On cross motions for summary judgment, a Magistrate Judge recommended that Petitioner's suit "be dismissed without prejudice for want of jurisdiction," on the authority of *Austin*. App. at 26a. The District Judge agreed in an Opinion dated September 25, 1996. He later denied a timely Motion for Reconsideration by Order dated December 5, 1996.[1]

Since the employers had already refused to arbitrate the claims, the dismissal of the suit without either compelling arbitration or retaining jurisdiction ended the statutory claims.

Petitioner prosecuted a timely appeal to the Court of Appeals. That Court affirmed the judgment on July 29, 1997, holding that Wright's only recourse was a union-sponsored grievance, and that he had no right to sue under the ADA:

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[1] In July, 1996, after the decision in *Austin v. Owens-Brockway Glass Container* changed the law in the Fourth Circuit, the union hiring hall referred Petitioner for work again, this time to two of the Respondents. Petitioner was again refused work. This time the union filed a grievance. The employer representatives have refused to process the grievance and have refused to arbitrate, whereupon the union has filed suit to compel arbitration. *Local 1422, ILA, AFL-CIO v. S.C. Stevedores Association, et al.*, C.A. No. 2:97-2886-21 (D.S.C. filed Sept. 22, 1997).

> "In Austin, this court established that collective bargaining agreements to arbitrate employment disputes are binding upon individual employees even when the dispute involves a federal cause of action. 78 F.3d at 885. Where such an agreement exists, a failure to process a claim under the agreement precludes a court from exercising jurisdiction over the merits of the claim. Id. Wright did not submit his claim to arbitration." App at 4a.

The Court further held that an arbitration clause with general language in a bargaining agreement would be construed to cover the arbitration of statutory claims:

> "An employer need not provide a laundry list of potential disputes in order for them to be covered by an arbitration clause. For example, in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), the Supreme Court held that a plaintiff was required to submit his ADEA claim to arbitration where the arbitration agreement covered 'any dispute, claim or controversy.' Id. at 23. The language of the CBA at issue in this case is equally broad, covering 'all matters' regarding 'terms and conditions of employment.' This language easily encompasses Wright's ADA claim." App. at 4a-5a.

This petition followed.

REASONS FOR GRANTING THE WRIT

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), and cases following it established a "bright-line" rule: because the union, rather than any individual employee, controls the exercise of the grievance / arbitration procedure under a collective bargaining agreement, a mandatory arbitration clause in such a labor agreement does not bar an employee's access to the courts to prosecute a claim based on a federal statute. The "bright-line" rule established by *Alexander* should not be changed: that rule promotes the effective enforcement of Congressional policies to prohibit employment discrimination and to resolve labor-management conflicts efficiently, it is fair, and it is easily followed by lay parties, The Fourth Circuit's attempt to discard this "bright-line" rule will embroil the courts in protracted litigation to define the contours of new rules.

The petition for a writ of certiorari should be granted because the decision below:

(1) conflicts with decisions of seven other circuits, applying *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), as preserved in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991);

(2) conflicts with decisions of this Court, particularly *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)[2]; and

(3) decides an important question in a way that disrupts settled doctrines and practices in labor-management relations.

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[2] As this Court stated in *Rodriguez v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), "If a precedent in this Court has direct application in a case, ... the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decision." The Fourth Circuit has not heeded that directive.

1. The writ should be granted to resolve the serious conflict between the decision below and the decisions of seven other courts of appeals that have held, since *Gilmer*, that an employee has a right to bring suit in federal court on a federal statutory claim, independent of the grievance/arbitration procedures of a collective bargaining agreement.

In *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 117 S.Ct. 432 (1996), the Court of Appeals held that this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), had effectively overruled *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The court below extended the rationale of *Austin* to deny Petitioner relief.[3] Five courts of appeals have expressly rejected the result in *Austin* in holdings. Two others have endorsed, post-*Gilmer*, the continuing vitality of *Alexander v. Gardner-Denver Co.* No other Court of Appeals has applied *Austin* to a claim of a worker covered by a Collective Bargaining Agreement.

The appellate courts that have, in holdings, expressly rejected the central rationale of *Austin* are the following:

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[3] After the decision in this case, another panel of the Court of Appeals for the Fourth Circuit limited the scope of *Austin* slightly, where the arbitration clause is narrowly limited to disputes "'growing out of the interpretation or application of any of the terms of *this Agreement*, [emphasis in original]'" *Brown v. TWA*, ___ F.3d ___, 156 L.R.R.M. 2481, 1997 WL 610821 (4th Cir. Oct. 6, 1997), slip op. at 7, *reh. denied*, Nov. 10, 1997. The panel in *Brown* reaffirmed *Austin*. The rule in the Fourth Circuit still conflicts with the other circuits and with *Alexander* and *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981).

Sixth Circuit	*Penny v. United Parcel Service*, ___ F.3d ___, 156 L.R.R.M. 2618 (Oct. 22, 1997)
Seventh Circuit	*Prymer v. Tractor Supply Co.*, 109 F.3d 354, 365 (7th Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 294, 66 USLW 3277, 3281 (Oct. 14, 1997)
Eighth Circuit	*Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 946 (1997)
Tenth Circuit	*Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1452-54 (10th Cir.), *pet. cert. filed*, 66 U.S.L.W. 3137 (Aug. 6, 1997)
Eleventh Circuit	*Brisentine v. Stone & Webster Engineering Corp.*, 117 F.3d 519 (11th Cir. 1997)
District of Columbia Circuit	*Cole v. Burns Intern. Security Services*, 105 F.3d 1465, 1478-79 (D.C. Cir. 1997) (dictum)
Second Circuit (Fair Labor Standards Act)	*Tran v. Tran*, 54 F.3d 115 (2d Cir 1995)

The rulings of the Fourth Circuit in *Austin* and in the decision below have created a fundamental conflict with other

circuit courts[4] as to whether labor arbitration agreements can ever "oust the court of jurisdiction" to hear statutory claims.[5]

The opinion in *Brisentine*[6] stated the consensus of the other seven circuits, 117 F.3d at 526-27:

> Under [the law as it is now] ..., a mandatory arbitration clause does not bar litigation of a federal statutory claim, unless three requirements are met. First, the employee must have agreed individually to

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[4] A divided panel of the United States Court of Appeals for the Third Circuit initially held that arbitral remedies had to be exhausted, but only where the CBA provided that the individual employee could personally require arbitration; that opinion was vacated and the case set for reargument *en banc*. *Martin v. Dana Corp.*, 114 F.3d 421, *vacated*, 114 F.3d 428 (3d Cir. 1997). However, counsel is advised that, after the union filed a brief clarifying that the union, not the individual employee, controlled the decision to seek arbitration, the case was remanded to the panel for reargument, held November 21, 1997. Many District Courts in the First, Fifth, and Ninth Circuits have also rejected *Austin*. See, e.g., *LaChance v. Northeast Publishing, Inc.*, 965 F.Supp. 177 (D.Mass. 1997); *Bush v. Carrier Air Conditioning*, 940 F.Supp. 1040 (E.D.Tex. 1996); *Hill v. American Nat'l Can Co.*, 952 F.Supp. 398 (N.D.Tex. 1996); *Krahel v. Owens-Brockway Glass Container, Inc.*, 971 F.Supp. 440 (D.Ore. 1997); *Buckley v. Gallo Sales Co.*, 949 F.Supp. 737 (N.D. Cal. 1996). New cases appear to be added to the WESTLAW database every month.

[5] The only case cited by the majority in *Austin* for its position on "ouster of jurisdiction" was a state court decision, *Big Vein Pocahontas Co. v. Browning*, 137 Va. 34, 120 S.E. 247 (1923). 78 F.3d at 878 n.1.

[6] The facts of the present case are extremely close to the facts in *Brisentine*. In both, the employer refused to accept the employee when he was referred by a union hiring hall; the claim was under the ADA; and the union filed no grievance, but instead "advised Brisentine to file a complaint with the EEOC rather than file a grievance." 117 F.3d at 521, 525.

> the contract containing the arbitration clause -- the union having agreed for the employee during collective bargaining does not count. Second, the agreement must authorize the arbitrator to resolve federal statutory claims.... Third, the agreement must give the employee the right to insist on arbitration if the federal statutory claim is not resolved to his satisfaction in the grievance process. All three of those requirements were met in the *Gilmer* case, which is the latest word from the Supreme Court on the subject. None of the requirements were met in this case.

This case presents squarely for review the sole issue of the continuing vitality of *Alexander v. Gardner-Denver Co.* This issue arises literally daily, in some union-represented bargaining unit somewhere in the nation. As long as this conflict in the circuits lingers, this Court will continuously be presented with petitions for review of the issue. As cited above, the Court has already denied petitions for review in *Austin* from the Fourth Circuit, in *Varner* from the Eighth Circuit (see 65 U.S.L.W. 3420) and in *Pryner* from the Seventh Circuit (see 66 U.S.L.W. 3049). A petition for review from the Tenth Circuit is pending in *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1452-54 (10th Cir. 1997), *pet. cert. filed*, 66 U.S.L.W. 3137 (Aug. 6, 1997).

The writ of certiorari should be granted to resolve this mature conflict between the circuit courts of appeals.

2. This Court's decisions in *Alexander v. Gardner-Denver Co.* and *Gilmer v. Interstate/Johnson Lane Corp.* require that statutory discrimination claims be submitted to a court, unless the employee personally waives his right to a judicial trial.

Few topics in modern law have so engaged the courts and public debate as the topic of arbitration -- both under collective bargaining agreements and in other areas.[7]

In 1974, this Court clearly decided in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), that an arbitration clause in a collective bargaining agreement did not bar an employee from pursuing a statutory claim under a federal employment discrimination statute. "Both rights have legally independent origins and are equally available to the aggrieved employee." 415 U.S. at 52.

One rationale for that decision was a skepticism about the adequacy of arbitration procedures for deciding statutory claims. But equally or more important, both in *Alexander* and cases that followed it, was the fact that the collective bargaining arbitration right was one controlled by the union rather than the individual employee. "A further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented... [T]he interests of the individual may be subordinated to the interests of all employees

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[7] Charles J. Coleman & Theodora T. Haynes, *Labor Arbitration: An Annotated Bibliography* (ILR Press: 1994), describes 1336 publications that discuss labor arbitration, not counting publications that address commercial arbitration of business disputes, or other forms of arbitration.

in the bargaining unit." 415 U.S. at 58 n.17. This concern has been repeated again and again. *See Livadas v. Bradshaw*, 512 U.S. 107, 127 n. 21 (1994). *See also McDonald v. City of West Branch*, 466 U.S. 284, 291 (1984): "the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee." Or, as in this case, the union may take no grievance action at all in response to the employee's request.

Alexander was followed by this Court, particularly in cases such as *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981)(contract providing for arbitration of "any controversy" between parties did not cover statutory claim)[8]; and *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

Then, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court held that an individual who

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[8] The decision below also conflicts squarely with *Barrentine*. *Barrentine* relied on *Alexander* to hold that claims under the Fair Labor Standards Act were not subject to mandatory arbitration, even when the arbitration clause of the CBA used broad language to define its scope:

> Respondents [employers] ... note that the collective-bargaining agreement between Arkansas-Best and petitioners' union requires that "any controversy" between the parties to the agreement be resolved through the binding contractual grievance procedures.... We reject this argument. 450 U.S. at 736-37.

In conflict with *Barrentine*, but without reference to it, the court of appeals held that the Bargaining Agreement had to be applied to statutory claims because the arbitration clause covered "all matters" regarding "terms and conditions of employment." App. at 5a. In *Austin*, the Fourth Circuit held that *Barrentine* had no relevance to employment discrimination claims because *Barrentine* involved FLSA claims. 78 F.3d at 883 n.2

personally agreed to resolve statutory claims by arbitration could be barred by such agreement from suing in a court to enforce the statutory claim. At the same time, this Court took pains to reaffirm and distinguish *Alexander* and its progeny:

> First, ... [s]ince the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA, which, as discussed above, reflects a "liberal federal policy favoring arbitration agreements." 500 U.S. at 35.

Since *Gilmer*, this Court has reiterated the continuing life of *Alexander*, in *Livadas v. Bradshaw*, 512 U.S. at 127 n.21.

Now all these cases -- *Alexander*, *Barrentine*, *McDonald*, and *Livadas* -- are dead letters in the Fourth Circuit, as this case plainly shows.

In this case, every factor that this Court has said distinguishes *Alexander* from *Gilmer* points to following *Alexander*. Instead, the court of appeals disposed of this case

by citing its earlier holding in *Austin v. Owens-Brockway Glass Container*, 78 F.3d 875 (4th Cir. 1996):

> "In Austin, this Court established that collective bargaining agreements to arbitrate employment disputes are binding upon individual employees even when the dispute involves a federal cause of action." App. at 4a.

The rule "established" in *Austin* is flatly contrary to *Alexander*. Yet, far from giving this Court's decision in *Alexander* a decent burial, the majority of the panel in *Austin* addressed *Alexander* only in a footnote. 78 F.3d 883 n.2. The majority acknowledged that "This case arises in the context of a collective bargaining agreement, so there may be concern for any tension between collective representation and individual rights." The majority dismissed this concern because "Miss Austin is a party to a voluntary agreement which has explicitly agreed to the arbitration of her statutory complaints. That [agreement] should be enforced." The majority finally observed that "although we do not rely on the FAA in this case,[9] we do rely on the federal labor law policy encouraging arbitration of labor disputes as expressed in the *Steelworkers Trilogy*." *Idem*.

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[9] See 78 F.3d at 879. Petitioner worked in the longshore industry, physically moving goods in interstate and foreign commerce. Therefore, § 1 of the Federal Arbitration Act excludes the agreement from coverage of the F.A.A. See, e.g., *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 357 (7th Cir.), *cert. denied*, 66 U.S.L.W. 3277, 3281 (1997); *Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1469 (D.C. Cir. 1997).

Austin's abbreviated discussion of *Alexander* reflected confusion about basic principles of labor-management law. Individual workers are never "parties" to a bargaining agreement. It is the union, not the individual employee, that controls the assertion of grievances. Further, a "labor dispute" is, in essence, a dispute about *collective* rights. Even a grievance on behalf of an individual worker is a collective dispute, which the union evaluates and acts upon in accordance with the significance of that worker's grievance to the collective rights of workers. When a grievance involves enforcement of rights derived from the CBA -- rights obtained through bargaining and subject to majority approval -- this Court's decisions (such as the *Steelworkers Trilogy*) grant wide latitude to the union to pursue or abandon the enforcement of such contract rights. The *Austin* majority confused a "labor dispute" with an individual worker's claim under a statute prohibiting employment discrimination.

The collective rights exercised by labor unions under bargaining agreements stand on a completely different footing from individual employees' rights under federal statutes. Under this Court's decisions, individual rights conferred by federal statutes cannot be subordinated to the majoritarian processes that decide which rights to enforce collectively. Judge K.K. Hall, dissenting in *Austin*, understood this point clearly. The *Austin* majority's failure to understand it is at the root of the errors committed by the Fourth Circuit, both in *Austin* and in this case.

The writ of certiorari should be granted to address the conflict between the foregoing decisions of this Court and the decision below.

3. The decision below ignores settled precedent on an important question that constantly confronts both lay parties and federal courts.

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991)(see *supra* at 15), this Court carefully preserved the distinction between labor arbitration and other arbitration in enforcing federal statutory rights. The endorsement by the overwhelming majority of the courts of appeals for this Court's reasoning in *Alexander* demonstrates its continuing soundness.

Congress has attempted to create a "user-friendly" administrative system for the assertion of rights under these statutes, through the Equal Employment Opportunity Commission, to enable lay employees to present these claims initially, without the assistance of attorneys. *Zipes v. TransWorld Airlines, Inc.*, 455 U.S. 385, 397 (1982), and *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972). These important objectives are well served by simplicity and stability in the procedures for asserting claims.

Alexander v. Gardner-Denver Co. had been the law for 22 years before the Fourth Circuit's decision in *Austin*. Not only was the rule well settled, but it was fair and easy for lay persons to understand: if the employee has a right conferred by a collective bargaining agreement, it can only be enforced by asking the union to invoke the proper procedures under that agreement; but if the employee has statutory rights (under any federal or state statute), those rights may be independently enforced through the EEOC and the courts. The *Austin/Brown* approach unsettles established law in a most confusing manner.

The Fourth Circuit's decision in this case, following *Austin*, purported to apply *Gilmer* to collective bargaining agreements. In fact, the *Austin* doctrine, as applied both in *Austin* and in this case to bar any hearing whatsoever on statutory claims, creates a revolutionary restriction on enforcing statutory rights that goes far beyond *Gilmer*.[10]

In *Gilmer*, the employer only sought an order that the claim be heard on the merits in arbitration; it made no attempt to bar a hearing. Here, even though Petitioner filed the statutory claim with the EEOC within 15 days, the Fourth Circuit has allowed Petitioner's employers to avoid any hearing on the merits.

In *Gilmer* this Court emphasized that "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 500 U.S. at 26. Arbitration can only be compelled "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, [so that] the statute will continue to serve both its remedial and deterrent function." *Gilmer*, 500 U.S. at 28, see *Austin*, 78 F.3d at 882.

Petitioner's case is typical of the upside-down application of *Gilmer* in the Fourth Circuit. Petitioner could

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[10] On a number of recent occasions, this Court has unanimously corrected decisions by the Fourth Circuit that curtail rights under employment discrimination statutes. See, e.g., *Robinson v. Shell Oil Co.*, 117 S.Ct. 843 (1997); *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307 (1996).

not "effectively vindicate" his statutory cause of action because: (a) the union directed Petitioner to enforce his rights by other means, which the Fourth Circuit held to be ineffective; (b) the stated time for filing the grievance had expired before Petitioner employed an attorney, only 15 days after Respondents refused to accept Petitioner for work; and (c) the court below refused to retain jurisdiction, which prevented any judicial review, in conflict with *Gilmer's* requirement that judicial review be "sufficient to ensure that arbitrators comply with the requirements of the statute." 500 U.S. at 32 n.4.

Thus, although the Fourth Circuit in *Austin* acknowledged and quoted the relevant principles from *Gilmer*, the court below has systematically applied *Austin*, not to assure that the statutory claims can be "effectively vindicated" in arbitration, but to assure that the statutory claims will never be heard anywhere on the merits. This distorts the ruling in *Gilmer* that employees must arbitrate certain disputes. It also has created much litigation on an issue where *Alexander*'s "bright-line" rule had guided everyone for more than twenty years of settled practice.

The Fourth Circuit's revolutionary restriction on enforcement of statutory rights presents an extremely important question that this Court will have to resolve some day. There will never be a better time.

CONCLUSION

The decision below conflicts with the decisions of every other appellate court that has considered the issue. Only in the Fourth Circuit is an employee who works under a collective bargaining agreement denied the right to take his statutory claims of discrimination to the federal court. Only in the Fourth Circuit will a worker who is represented by a union completely forfeit his statutory discrimination claim if the union chooses not to pursue it. The writ of certiorari should be granted to resolve this conflict, so that unionized workers everywhere in the nation have the same protections under federal anti-discrimination statutes.

Respectfully submitted,

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Charleston, South Carolina
November 25, 1997

Appendix

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

CEASAR WRIGHT,	)	
	)	
Plaintiff-Appellant,	)	
v.	)	
UNIVERSAL MARITIME SERVICE	)	
CORPORATION; STEVENS SHIPPING &	)	
TERMINAL COMPANY; STEVEDORING	)	No. 96-2850
SERVICES OF AMERICA; RYAN-	)	
WALSH, INCORPORATED; STRACHAN	)	
SHIPPING COMPANY; CERES MARINE	)	
TERMINALS, INCORPORATED; SOUTH	)	
CAROLINA STEVEDORES	)	
ASSOCIATION,	)	
	)	
Defendants-Appellees.	)	
	)	

Appeal from the United States District Court
for the District of South Carolina, at Charleston.
David C. Norton, District Judge.
(CA-96-165-2-18-AJ)

Argued: July 7, 1997

Decided: July 29, 1997

Before WILKINSON, Chief Judge, and WILKINS and HAMILTON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Ray P. McClain, Charleston, South Carolina, for Appellant. Charles Archibald Edwards, Raleigh, North Carolina, for Appellees. **ON BRIEF:** Jeffrey M. Hahn, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Ceasar Wright sued the South Carolina Stevedores Association ("SCSA") and six of its individual members alleging violations of the Americans with Disabilities Act. The district court, relying on Austin v. Owens-Brockway Glass Container, 78 F.3d 875 (4th Cir. 1996), dismissed the case because Wright had failed to submit his claim to arbitration as required by the collective bargaining agreement ("CBA") between the SCSA and Wright's union. On appeal, Wright argues that Austin is inapplicable because the CBA here does not specifically address ADA claims. This contention is meritless. An arbitration agreement need not list every possible dispute between the parties in order to be binding. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). To hold otherwise would directly contradict Supreme Court precedent and the strong federal policy favoring arbitration. Accordingly, we affirm the judgment of the district court.

I.

Ceasar Wright worked as a longshoreman in Charleston, South Carolina[,] from 1970 to 1992. On February 18, 1992, he was injured at work. Consequently, Wright filed suit for benefits under the Longshore and Harbor Workers' Compensation Act, and his employer, Stevens Shipping Company, settled the claim for $250,000. During the course of this suit, Wright represented that he had been totally and permanently disabled.

On January 2, 1995, Wright appeared at the hiring hall of the Local 1422 of the International Longshoreman's Association ("the union"), claiming that he was ready and able to return to work. Wright presented a note from his physician, Dr. Howard Brilliant, which stated that he could return to full duty.

From January 2 through January 11, 1995, the union referred Wright to four different stevedoring contractors. Initially, none of these employers objected to Wright's work. However, when the companies discovered that Wright had earlier received a settlement for total and permanent disability, they, both individually and acting through their multi-employer collective bargaining representative the SCSA, advised the union that Wright would no longer be accepted for employment referral. The SCSA maintained that under the CBA, Wright was not qualified to work due to his total and permanent disability.

The union responded with a letter disputing the SCSA's interpretation of the CBA. However, neither Wright nor the union ever filed a formal grievance under the CBA's arbitration procedure, and the union advised Wright to pursue a statutory claim under the Americans with Disabilities Act. Wright then filed this suit against the SCSA and six of its individual

members.

The case was referred to a magistrate judge who, citing Austin v. Owens-Brockway Glass Container, 78 F.3d 875 (4th Cir. 1996), recommended the case be dismissed because Wright had failed to submit his claim to arbitration as required by the CBA. The district court adopted this position over Wright's objections. Wright now appeals.

II.

In Austin, this court established that collective bargaining agreements to arbitrate employment disputes are binding upon individual employees even when the dispute involves a federal cause of action. 78 F.3d at 885. Where such an agreement exists, a failure to process a claim under the agreement precludes a court from exercising jurisdiction over the merits of the claim. Id. Wright did not submit his claim to arbitration. Thus, under Austin, the only issue in this case is whether there was an agreement to arbitrate ADA claims in the CBA between Wright's union and the SCSA.

The arbitration clause at issue is particularly broad. The clause states that the "Union agrees that this Agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment." However, Wright contends that since the agreement does not specifically address ADA claims it cannot be binding here.

We are unpersuaded. An employer need not provide a laundry list of potential disputes in order for them to be covered by an arbitration clause. For example, in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), the Supreme Court held that a plaintiff was required to submit his ADEA claim to arbitration where the arbitration agreement covered "any dispute, claim or controversy." Id. at 23. The language of the CBA at issue in this case is equally broad,

covering "all matters" regarding "terms and conditions of employment." This language easily encompasses Wright's ADA claim. A narrower interpretation of the agreement would fly directly in the face of both the ADA's statutory preference for arbitration, 42 U.S.C. § 12212, and the strong federal policy favoring alternative dispute resolution, see Moses H. Cone Memorial Hospital v. Mercury Construction Co., 460 U.S. 1, 24-25 (1983).

Under Austin, Wright must submit his claim to arbitration. Wright, however, contends that we should remand this case so that the district court may retain jurisdiction to monitor the arbitration process. We decline this invitation. Austin does not require a district court to retain jurisdiction once a case is dismissed for failure to exercise arbitral remedies. Indeed, the district court precisely followed Austin's instruction that a claim that has not been properly submitted to arbitration should be dismissed without prejudice and without any opinion on "the merits of the claim, or whether or not the same is subject to arbitration." 78 F.3d at 886. Those issues are for the arbitrators, and the district court's disposition of this case was entirely proper.

III.

For the foregoing reasons we affirm the judgment of the district court.

AFFIRMED

[FILED
SEP 27 1996
LARRY W. PROPES, CLERK
CHARLESTON, SC]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
[CHARLESTON] DIVISION

Ceasar Wright,	)	
	)	
Plaintiff,	)	C/A No. 2:96-0165-18AJ
	)	
vs.	)	
	)	
Universal Maritime Service Corp.; Stevens Shipping & Terminal Company; Stevedoring Services of America; Ryan-Walsh, Inc.; Strachan Shipping Company; Ceres Marine Terminals, Inc.; and South Carolina Stevedores Association,	)	**ORDER**
	)	
Defendants.	)	
	)	

This matter is before the court upon the magistrate judge's recommendation that the above-captioned case be dismissed *without prejudice*. The magistrate judge makes this recommendation because he determined this court lacks jurisdiction to adjudicate Plaintiff's employment discrimination claim.

I. TIME FOR FILING OBJECTIONS

A petitioner may object, in writing, to a magistrate judge's report within ten days after being served with a copy of that report. 28 U.S.C. §636(b) (1). Three days are added to the ten day period if the recommendation is mailed rather than personally served. The magistrate judge's report and recommendation was filed on June 14, 1996. Plaintiff filed his timely written objections with the court on June 27, 1996. Defendants filed a response to Plaintiff's objections on July 9, 1996.

II. REVIEW OF MAGISTRATE JUDGE'S REPORT

This court is charged with conducting a de novo review of any portion of the magistrate judge's report to which a specific objection is registered and may accept, reject, or modify, in whole or in part, the recommendations contained in that report. 28 U.S.C. § 636(b)(1). A review of the record and Plaintiff's objections indicates that the magistrate judge's report accurately summarizes this case and the applicable law. Accordingly, the magistrate judge's report is incorporated into this order.

The magistrate judge determined that Plaintiff had not followed the grievance procedures established by the applicable collective bargaining agreement. The rule of the Supreme Court and this circuit is that an employee must follow the grievance procedure established by the collective bargaining agreement prior to filing suit in federal court. Republic Steel Corp. v. Maddox, 379 U.S. 650, 652, 85 S.Ct. 614, 616 (1965); Adkins v. Times-World Corp., 771 F.2d 829, 832 (4th Cir. 1985), cert. denied, 474 U.S. 1109, 106 S.Ct. 896 (1986); see also Austin v. Owens-Brockway Glass, 78 F.3d 875 (4th Cir. 1996) (finding plaintiff was precluded from bringing lawsuit because his complaint was subject to mandatory arbitration

which he bypassed). The magistrate judge concluded Plaintiff's complaint was subject to mandatory arbitration under the terms of the bargaining agreement and, thus, that this court lacks jurisdiction to hear the case.

This court is charged with conducting a de novo review of any portion of the magistrate judge's report to which a specific objection is registered. 28 U.S.C. § 636(b)(1) (emphasis added). Plaintiff's objections regurgitate virtually, if not completely, verbatim his arguments in his motion for partial summary judgment. As noted, the magistrate judge accurately summarized this case and the applicable law. Therefore, most of Plaintiff's objections have already been addressed.

As the magistrate judge concluded, arbitration applies to Plaintiff's claims. In reaching his conclusion, he relied heavily on the reasoning in the Austin case. Plaintiff objects to the reliance upon Austin, arguing that the case is distinguishable from this action.

Specifically, Plaintiff argues that the collective bargaining agreement in Austin contained a specific nondiscrimination clause listing "gender and disability discrimination claims as claims that are subject to arbitration." (Objection, p. 6). Plaintiff also argues that the Austin contract contained an obligation to administer the contract "in accordance with the applicable provisions of the Americans with Disabilities Act." (Objection, p. 6). Unlike Austin, contends Plaintiff, the collective bargaining agreement has no provision guaranteeing nondiscrimination and only contains language that no provision or part of the agreement shall be violative of any Federal or State law.

Austin, in fact, involved a specific nondiscrimination provision and referenced the Americans with Disabilities Act.

However, there is no requirement that the specific statu[t]e involved must be named for the arbitration bar to apply. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S. Ct. 1647 (1991). In Gilmer, the decision upon which Austin was based, the court determined that plaintiff's ADEA claims were barred because of the failure to arbitrate them. There was no reference to the ADEA in the arbitration agreement at issue.

Despite Plaintiff's attempt to differentiate Austin from this action, this court cannot overlook the overriding federal policy favoring arbitration. See American Recovery Corp. v. CTI, [96] F.3d [88] (4th Cir. 1996) (citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24-25). The CTI case involved a consulting agreement that contained an arbitration clause. The court's discussion before finding that plaintiff's claims were arbitrable under the agreement is enlightening.

> ...'[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.' Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24-25 (1983). 'To that end, the heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.' Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989). Thus, we may not deny a party's request to arbitrate an issue 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' Warrior & Gulf Navigation Co., 363 U.S. at 582-823.

CTI, [96] F.3d [88]. As noted, Plaintiff objects that the bargaining agreement at issue is not as specific concerning disability discrimination as the one [in] Austin and that an Austin analysis should not apply. Even if this court did not agree with the magistrate judge's analysis under Austin, it would be compelled to rule in favor of arbitration given the Fourth circuit's decision in CTI. The arbitration provision in this case, mandating that no provision or part of the agreement be violative of any federal or State law, is easily "susceptible of an interpretation" that it covers Plaintiff's disability discrimination claims. Thus, this court agrees with the magistrate judge's conclusion that the arbitration agreement should be enforced.

The magistrate judge did not specifically address Plaintiff's argument that the Austin decision should not be applied retroactively. Plaintiff asserts in one line in his objection that Austin "can only be applied *prospectively,* under the three-factor analysis in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106-07 (1971)."

Austin can be applied retroactively. The general rule in American jurisprudence is that judicial decisions are to be applied retroactively. Cash v. Califano, 621 F.2d 626, 628 (4th Cir. 1980). This is necessarily so for the parties before the court and implicitly so for all other potential litigants. Id. A corollary of this proposition is the rule that a court will apply judicial case law as that law exists at the time of its decision. Id. Although retroactive application is the norm, some cases are applied prospectively. The party seeking to have a court adopt a rule of nonretroactivity in a particular case has the burden of presenting an equitable reasons [*sic*] to overcome the norm. Id. Courts enter a three-factor analysis in determining

whether there should be prospective application only.[1] Id. (citing Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S. Ct. 349 (1971)).

Austin itself was applied retroactively. In its Austin decision, the Fourth Circuit did not make any finding that it would be impermissible under Chevron to apply its decision retroactively, and instead applied the decision to dismiss plaintiff's claim. If the Austin court applied its decision retroactively to the parties before it, implicitly the decision should be applied retroactively to cases pending at the time of the decision.

Under the Chevron analysis, Austin did not establish a new legal principle. It did not overrule clear past precedent on which the parties may have relied nor was it a case of first impression, resolution of which was not foreshadowed in earlier cases. If anything, Austin clarified earlier precedent, namely Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). In fact, the Fourth Circuit relied heavily on Gilmer in reaching its conclusions in Austin. Gilmer provided that once parties have contracted to arbitrate a statutory matter, the parties should be held to that agreement unless Congress intended to prohibit arbitration of that matter. Gilmer, 500 U.S. at 26. The Austin court concluded that under the Civil Rights Act and the Disabilities Act Congress intended to encourage rather than prohibit arbitration. Thus, the parties were held to their agreement to arbitrate the discrimination dispute.

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[1] The three factors are: (1) whether the decision established a new legal principle by overruling clear past precedent on which litigants may have relied or by deciding a case of first impression, resolution of which was not clearly foreshadowed in earlier cases; (2) whether retroactive application may further the application of the rule; and (3) whether the decision could produce substantial inequitable results if applied retroactively. Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971).

Plaintiff takes issue with the specific language in the arbitration agreement. As noted above, Gilmer contained no reference to federal and state laws, as the bargaining agreement in this case does. Because it appears Austin was a continuation of Gilmer and its progeny, Plaintiff cannot show that clear past precedent upon which he relied has been overruled.

Second, retroactive application will further, not retard, application of the rule. As noted, Austin is a continuation of cases encouraging arbitration of disputes when parties have agreed to do so.

Finally, a retroactive decision would not produce inequitable results. Plaintiff has not presented any equitable reason for a prospective application only of Austin, other than stating that applying Austin retroactively "would plainly be inequitable." (Plaintiff's Motion for Partial Summary Judgment, p. 18). The parties agreed to arbitrate their disputes. Application of Austin merely requires them to do so.

The Supreme Court has approved retroactive application of new case law holding a claim to be barred by an agreement to arbitrate. See Rodriguez de Quijas v. Shearson/American Exp. Inc., 490 U.S. 477 (1989). In Rodriguez de Quijas, the Supreme Court upheld enforcement of an agreement to arbitrate a dispute that otherwise would have been actionable under the Securities Act of 1933. Applying Chevron Oil, the Court held that its new principle of law for arbitration agreements under the Securities Act should be applied retroactively. Rodriguez de Quijas, 490 U.S. at 485.

Plaintiff also contends that the collective bargaining agreement cannot limit his time to file his discrimination grievance to 48-hours. However, parties can contract for shorter limitations periods. See Lockheed Corp. v. Spink, ___ U.S. ___, 116 S. Ct. 1783 (1996) (agreeing that an employer

can protect itself from suits by offering incentives conditioned upon the release of claims against the employer); Austin, 78 F.3d at 880 (finding plaintiff's ADA claim to be barred by the failure to arbitrate under provision requiring a request for arbitration within 10 days of the grievance panel decision).

Plaintiff's argument that the 48-hour limit on grievances contravenes the statutory policy of the Americans with Disabilities Act, which sets the statute of limitations at no less than 180 days, is interesting. However, Plaintiff has made no attempt to pursue the grievance procedures under the collective bargaining agreement. As the magistrate judge noted, the question whether arbitration may now be available or the result thereof is not before the court. (Report and Recommendation, p. 8). Thus, it is not appropriate for Plaintiff to question the limitation period at this time.

III. CONCLUSION

For the reasons set forth in detail by the magistrate judge, it is therefore,

ORDERED that Respondents' Motion for Summary Judgment be **GRANTED** and this action be **DISMISSED** *without prejudice*,

IT IS SO ORDERED.

/s/
DAVID C. NORTON
UNITED STATE DISTRICT JUDGE

Charleston, South Carolina
September [27], 1996

[FILED
DEC 5 - 1996
LARRY W. PROPES, CLERK
CHARLESTON, SC]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
[CHARLESTON] DIVISION

Ceasar Wright,	)	
	)	
Plaintiff,	)	C/A No. 2:96-0165-18AJ
	)	
vs.	)	
	)	
Universal Maritime Service Corp.; Stevens Shipping & Terminal Company; Stevedoring Services of America; Ryan-Walsh, Inc.; Strachan Shipping Company; Ceres Marine Terminals, Inc.; and South Carolina Stevedores Association,	)	**ORDER**
	)	
Defendants.	)	
	)	

This matter is before the court upon Plaintiff's Motion to Vacate or to Reconsider this court's September 27, 1996[,] order granting summary judgment to Defendants.

A motion to vacate or for reconsideration filed pursuant to Federal Rule of Civil Procedure 59(e) allows a losing party to seek the trial court's reconsideration of its order granting

summary judgment. Ford Motor Credit Co. v. Bright, 34 F.3d 322 (5th Cir. 1994); Fed.R.Civ.P. 59(e). The trial court exercises its discretion when reviewing the record and considering a motion to vacate. Id. at 324; see Barton v. Sindall Transport, Inc., 934 F.2d 318, 1991 WL 87206 (4th Cir. 1991).

Plaintiff first disputes this court's reliance on Austin v. Owens-Brockway Glass Container, 78 F.3d 875 (4th Cir. 1996), in granting Defendants' Motion for Summary Judgment. He argues that this court is order should be vacated and a decision deferred until the Supreme Court concludes any review of Austin. On November 12, 1996, the United States Supreme Court denied certiorari in Austin v. Owens-Brockway Glass Container, [117] S.Ct. [432], 1996 WL 514567 (Nov. 12, 1996). Accordingly, Plaintiff's first argument is moot.

In his second argument, Plaintiff essentially argues that the 48-hour arbitration provision is in contravention of the 180-day (300-day in South Carolina) time limit provided for in the ADA. Plaintiff asserts that this court erroneously refused to address his arguments with regard to the 48-hour time period because it believed Plaintiff had not attempted to submit his dispute to arbitration.

The arbitration provision does not limit to 48-hours the time in which a employee must file an age discrimination claim. The procedure provided for in the collective bargaining agreement initially requires an attempt by the union and the employer to informally resolve an employment dispute. (Longshoremen's Agreement, p. 27 at ¶ 15B). There is no time limit concerning this initial attempt at resolution. It is not until the matter cannot be resolved that it must be submitted in

writing within 48-hours to a grievance committee.[1] (Longshoremen's Agreement, p. 27 at ¶ 15B). This court is not convinced that this procedure unduly limits the time in which an employee has to bring an employment discrimination claim.

Both parties agree that Plaintiff initially followed the proper procedure under the collective bargaining agreement for filing a grievance against Defendants. Plaintiff 's union raised the issue concerning Plaintiff's denial of employment with Defendants: "If Caesar Wright is proven to have limited disability and he returns to work and can perform his duties, I believe Federal Laws protect his right to do so under the 'American[s] with Disability Act.'" (January 12, 1995[,] letter from Benjamin Flowers, Union President). However, the dispute was not resolved. Under the collective bargaining agreement, the proper procedure at that point would have been for the union to reduce Plaintiff's grievance to writing within 48 hours and submit it to the Port Grievance Committee. Instead, the union did not pursue the matter, and Plaintiff initiated a complaint with the Equal Employment Opportunity Commission. Plaintiff contends that the union recommended he pursue his statutory remedies under the ADA rather than arbitrate the dispute.

Plaintiff's dispute should have been submitted to a grievance committee to be resolved. However, Plaintiff argues that neither he nor the union knew, until the Fourth Circuit's decision in Austin, that ADA claims would be covered under the collective bargaining agreement arbitration provision. This

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[1] The grievance procedure involves several possible stages. If the initial grievance committee cannot resolve the dispute, it goes to a second grievance committee, then to arbitration. When this court refers to the "arbitration provision" in the collective bargaining agreement, it is referring to the grievance procedure provision.

court disagrees, as discussed below, that Austin changed the prior law allowing parties to agree to arbitrate federal statutory claims.

Plaintiff's final argument is that Austin should not be applied retroactively because it changes prior law and shortens the statute of limitations for bringing an age discrimination claim. This court properly analyzed the Chevron Oil factors in determining that Austin is to be applied retroactively. Austin provides that federal statutes like the Civil Rights Act and the ADA do not prohibit agreements to arbitrate disputes under them. However, this does not, as Plaintiff argues, change previous law. For example, Austin relied on prior decisions such as Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), in which the United States Supreme Court made clear that agreements to arbitrate statutory claims are enforceable. This court finds untenable Plaintiff's position that, prior to Austin, he and his union were unaware that parties can agree to submit federal statutory claims to arbitration.

Here, the collective bargaining agreement specifically states that "[i]t is the intention and purpose of all parties hereto that no provision or part of this Agreement shall be violative of any Federal or State Law." (Longshoremen's Agreement, p. 35 at ¶ 17). Plaintiff and his union, through the collective bargaining agreement, were obligated to submit ADA and other claims to the grievance procedure.

Furthermore, Austin does not mandate a particular time period in which a plaintiff must submit his case to arbitration. In fact, the court in Austin specifically declined to address whether arbitration was then available to the plaintiff under a provision requiring disputes to be submitted to arbitration within ten days because that issue was not before the court. Austin, 78 F.3d at 886.

As indicated above, Plaintiff's claim should have been submitted to a grievance committee pursuant to the arbitration provision. For whatever reason, his union chose not to pursue his claim.[2] Because the grievance procedures were not followed, this court granted Defendants' Motion for Summary Judgment and dismissed the case *without prejudice*. This court will not vacate its order granting summary judgment to Defendants.

It is therefore,

ORDERED that Plaintiff's Motion Vacate or Reconsider be **DENIED.**

IT IS SO ORDERED.

[S/]
DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

Charleston, SOUTH Carolina
December [5], 1996

---

[2] This court is well aware of the line of cases allowing an employee to bring a civil action without first pursuing contractual arbitration requirements when his union does not fairly represent his interests. See DelCostello v. Teamsters, 462 U.S. 151 (1983); Hines v. Anchor Motor Freight, Inc, 424 U.S. 554 (1976); and Vaca v. Sipes, 386 U.S. 171 (1967). However, Plaintiff has not demonstrated, or even argued, that the union handled his grievance only perfunctorily or in bad faith, nor is there substantial reason to believe that a union breach of duty contributed to an erroneous outcome in the contractual grievance proceedings. See Hardee v. North Carolina Allstate Services, Inc., 537 F.2d 1255, 1258 (4th Cir. 1976) (citing Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976)).

[FILED
JUN 14 1996
LARRY W. PROPES, CLERK
CHARLESTON, SC]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CEASAR WRIGHT,	)	C. A. No. 2:96-0165-18AJ
	)	
Plaintiff,	)	
	)	
-versus-	)	**REPORT AND**
	)	**RECOMMENDATION**
UNIVERSAL MARITIME	)	
SERVICE CORP.;	)	
STEVENS SHIPPING &	)	
TERMINAL COMPANY;	)	
STEVEDORING SERVICES	)	
OF AMERICA;	)	
RYAN-WALSH, INC.;	)	
STRACHAN SHIPPING	)	
COMPANY; CERES	)	
MARINE TERMINALS,	)	
INC.; AND SOUTH	)	
CAROLINA STEVEDORES	)	
ASSOCIATION,	)	
	)	
Defendants.	)	
	)	

This action is before the undersigned United States Magistrate Judge for a report and recommendation on the

plaintiff's motion for partial summary judgment and the defendants' motion for summary judgment. 28 U.S.C. § 636(b).

Caesar Wright (Wright) filed this employment discrimination action against his former employers on January 19, 1996. Wright alleged that the defendants, Universal Maritime Service Corp. (Universal), Stevedoring Services of America, Inc., Stevens Shipping Company (Stevens), Ryan-Walsh Inc., Strachan Shipping Company, Ceres Marine Terminals, Inc., and South Carolina Stevedores Association (SCSA)[1], (collectively defendants), violated his right to employment under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 et. seq. Following the close of discovery, Wright moved for partial summary judgment on May 3, 1996, on the defendants' affirmative defenses of arbitration, qualified person, estoppel by claim settlement, accord and satisfaction, estoppel by receipt of social security disability benefits, waiver, timeliness, and fraud. The defendants moved for summary judgment on that same day. The parties have responded to the opposing motions and oral argument before the undersigned was had on May 22, 1996. Hence, it appears consideration of the motions is appropriate.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidav s, if any, show that there is no genuine issue as to any materi fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, (1986). A "genuine issue of material fact exists only where there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for

[1] This defendant is the collective bargaining unit for the other defendants rather that an employer itself.

that party.'" Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510 (1986)*[sic]*. In considering such a motion, the court must view all inferences in the light most favorable to the nonmoving party. The court will enter summary judgment against a party who does not come forward with evidence that would reasonably permit a finder of fact to find in his or her favor on a material question. Once the moving party has supported its motion for summary judgment, any fact asserted in the movant's affidavit will be accepted by the court as true unless the adverse party submits his own affidavits or other admissible evidence contradicting the assertion. Fed.R.Civ.P. 56(e).

It is undisputed that Wright worked from 1970 through 1992 as a longshoreman at the Port of Charleston, South Carolina. On February 18, 1992, he sustained a serious injury to his right heel and back while working for defendant Stevens. Wright pursued a claim for disability compensation under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §901 et. seq. Pursuant to a settlement agreement, Stevens paid Wright $250,000.00 and paid $10,000.00 in Wright's legal expenses.

Wright did not work again until January 2, 1995, when his union referred him for work with Steven [*sic*] at Wright's request. Wright had obtained a written release to return to work from a treating physician, Dr. Howard Brilliant. Wright worked for each defendant for a period of one to four days until January 11, 1996. Wright performed his duties satisfactorily. Nonetheless, the general manager of Universal advised the union through Local 1422's president, Benjamin Flowers, that Wright would not be accepted in the future, and referenced various clauses of the collective bargaining agreement (CBA). (Stipulated doc. 21). Defendant SCSA confirmed the denial of employment to Benjamin Flowers. Wright himself contacted

the union to complain that he had been refused work. On January 12, 1996, Benjamin Flowers wrote Universal and copied SCSA to express his disagreement with their interpretation of the portions of the CBA they relied upon and to protest what he referred to as a "lock-out" in violation of yet another provision of the CBA. (Stipulated doc. 22).

The local did not pursue the matter, however. No grievance was filed, nor did the parties seek compulsory arbitration as required by the CBA, (CBA Section 15(B)[)], and instead Wright initiated a complaint with the Equal Employment Opportunity Commission, received a right to sue letter, and filed this action.

The defendants assert Wright is estopped from pursuing this action because he failed to comply with the terms of the CBA. It appears the defendants are partially correct. That default renders this court without jurisdiction to adjudicate Wright's claim.

On March 12, 1996, the Fourth Circuit decided Austin v. Owens-Brockway Glass, 78 F.3d 875 (4th Cir.1996), which is controlling here. In that case, the plaintiff attempted to sue her former employer for alleged violations of the ADA. The employer argued that the complaint should be dismissed because the plaintiff failed to use the grievance-arbitration procedure set forth in the collective bargaining agreement between the employer and the company union. The agreement provided that disputes under the CBA were to be governed by a grievance procedure which provided for the compulsory submission of all disputed claims to a neutral third party arbitrator whose decision was to be final and binding upon the parties. The CBA stated that "any disputes under this article ... shall be subject to the grievance procedure." Because plaintiff's complaint was subject to mandatory arbitration which the plaintiff bypassed, the court applied the holding in Gilmer v.

Interstate Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647 (1991)[,] and its progeny to find that Ms. Austin was precluded from bringing the lawsuit. Further, the Fourth Circuit reasoned since a valid agreement to arbitrate future disputes effectively ousts a court of jurisdiction, it would not consider the remaining defenses raised at summary judgment. Austin at 878.

The Austin court reasoned:

> In deciding whether to enforce the arbitration provision in this collective bargaining agreement, we start with and rely upon the "well-recognized policy of federal labor law favoring arbitration of labor disputes." Adkins v. Times-World Corp., 771 F.2d 829, 831 (4th Cir. 1985), cert. denied, 474 U.S. 1109, 106 S.Ct. 896 (1986). In the Steelworkers trilogy, the Supreme Court established that arbitration is favored in labor disputes. See e.g., United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347 (1960); United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 80 S.Ct. 1343 (1960). We need not rely on the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., in this case because, in this circuit, the FAA is not applicable to labor disputes arising from collective bargaining agreements. Domino Sugar Corp. v. Sugar Workers Local Union 392, 10 F.3d 1064, 1067 (4th Cir. 1993) ....
>
> In Gilmer, the Supreme Court made clear that agreements to arbitrate statutory claims are enforceable. Gilmer, 500 U.S. at 26, 111 S.Ct. at 1652. The Gilmer Court recognized that arbitration of a statutory claim is not equal to giving up any right under a statute, it is

simply another forum in which to resolve the dispute: [B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. Gilmer, 500 U.S. at 26, 111 S.Ct. at 1652 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 105 S.Ct. 3346, 3354 (1985)). Gilmer thus rejects the principal concern in Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, (1974), that arbitration is an "inappropriate forum" for the resolution of Title VII statutory rights. Alexander, 415 U.S. at 56, 94 S.Ct. at 1023-24. Emphasizing its support of arbitration as a method of dispute resolution, the Gilmer Court stated: [A]ttacks on [the adequacy] of arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." Gilmer, 500 U.S. at 30, 111 S.Ct. at 1654 (third alteration in original) (quoting Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481, 109 S.Ct. 1917, 1920 (1989).

Gilmer further provides that once parties have contracted to arbitrate a statutory matter, the parties should be held to that agreement unless Congress intended to prohibit arbitration of that matter: "[H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." ... If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an "inherent conflict" between

arbitration and the [statute's] underlying purposes. Gilmer, 500 U.S. at 26, 111 S.Ct. at 1652 (quoting Mitsubishi, 473 U.S. at 628, 105 S.Ct. at 3354-55). The language of the statutes could not be any more clear in showing Congressional favor towards arbitration. The Civil Rights Act of 1991, amending Title VII, states: Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title. Pub.L. No. 102-166, § 118,105Stat.1071,1081[*sic*]. The Americans with Disabilities Act contains identical language: Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under this chapter. 42 U.S.C. § 12212. The meaning of this language is plain--Congress is in favor of arbitration.

Id. at 881.

The rule of the Supreme Court and this circuit is that an employee must follow the grievance procedure established by the CBA prior to filing suit in federal court, Republic Steel Corp. v. Maddox, 379 U.S. 650, 652, 85 S.Ct. 614, 616 (1965), Adkins v. Times-World Corp., 771 F.2d 829, 832 (4th Cir. 1985), cert. denied, 474 U.S. 1109, 106 S.Ct. 896 (1986). Thus, an employee cannot sue an employer without first going through the grievance procedure, and this is what the plaintiff is attempting to do here. He is a party to a voluntary agreement to submit employment claims to arbitration. The CBA is consistent with the text of the ADA, the legislative intent behind the statute, and the purposes of those statutes. Congress did not intend to preclude arbitration of claims under the ADA.

Austin at 885, 886. The arbitration agreement should be enforced. The question of whether arbitration may now be available or the result thereof is not before the court. Since it appears the court lacks jurisdiction, the dismissal of the case should be without prejudice to the merits of the claim asserted.

Accordingly, it is recommended that this action be dismissed without prejudice for want of jurisdiction.

Respectfully submitted,

/s/
Robert S. Carr
United States Magistrate Judge

Charleston, South Carolina
June 14, 1996

STATUTORY PROVISIONS INVOLVED

§ 2000e-5 Enforcement provisions

* * *

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one

hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the commission to obtain voluntary compliance.

* * *

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter.

Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

* * *

§ 12102. Definitions

(2) Disability

The term "disability" means, with respect to an individual --

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

* * *

§ 12111. Definitions

As used in this subchapter:

* * *

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

* * *

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar week in the current or preceding year, and any agent of such person.

* * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

* * *

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes --

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or

employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration --

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

* * *

§ 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

* * *

§ 12212. Alternative means of dispute resolution

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

78 F.3d 875
64 USLW 2586, 151 L.R.R.M. (BNA) 2673, 70 Fair Empl.Prac.Cas. (BNA) 272, 67 Empl. Prac. Dec. P 43,970, 5 A.D. Cases 488, 15 A.D.D. 166, 7 NDLR P 394
(Cite as: 78 F.3d 875)

Linda AUSTIN, Plaintiff-Appellant,
v.
OWENS-BROCKWAY GLASS CONTAINER, INCORPORATED, Defendant-Appellee.
Equal Employment Opportunity Commission; Equal Employment Advisory Council,
Amici Curiae.
Linda AUSTIN, Plaintiff-Appellee,
v.
OWENS-BROCKWAY GLASS CONTAINER, INCORPORATED, Defendant-Appellant.
Equal Employment Opportunity Commission; Equal Employment Advisory Council,
Amici Curiae.

Nos. 94-1213, 94-1265.

United States Court of Appeals,
Fourth Circuit.

Argued Feb. 3, 1995.

Decided March 12, 1996.

Discharged employee brought action against her former employer for violating Title VII and Americans with Disabilities Act (ADA) by terminating her while she was on medical leave and receiving workers' compensation benefits and not reassigning her to light-duty work when she was able

to return to work. The United States District Court for the Western District of Virginia, Jackson L. Kiser, Chief Judge, 844 F.Supp. 1103, granted summary judgment for employer, and employee appealed. The Court of Appeals, Widener, Circuit Judge, held that: (1) employee had standing under collective bargaining agreement (CBA) to arbitrate her dispute after being discharged; (2) arbitration of employee's Title VII and disability claims was mandatory under CBA; (3) agreement to arbitrate ADA and Title VII statutory claims was enforceable; and (4) employee could not sue employer before pursuing arbitration of her discrimination claims.

Affirmed as modified and remanded.

K.K. Hall, Circuit Judge, filed dissenting opinion.

*877Appeals from the United States District Court for the Western District of Virginia, at Danville. Jackson L. Kiser, Chief District Judge. (CA-93-51- D).

ARGUED: Barbara Rubin Hudson, Danville, Virginia, for Appellant. Karen Marie Moran, Office of General Counsel, Equal Employment Opportunity Commission, Washington, DC, for Amicus Curiae EEOC. Thomas Michael Lucas, Mary Chapman Hamilton, Vandeventer, Black, Meredith & Martin, Norfolk, Virginia, for Appellee. **ON BRIEF**: James R. Neely, Jr., Deputy General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, Samuel A. Marcosson, Office of General Counsel, Equal Employment Opportunity Commission, Washington, DC, for Amicus Curiae EEOC. Robert L. O'Donnell, Vandeventer, Black, Meredith & Martin, Norfolk, Virginia, for Appellee. Douglas S. McDowell, Ann Elizabeth Reesman, McGuiness & Williams, Washington, DC, for Amicus Curiae Advisory Council.

Before WIDENER and HALL, Circuit Judges, and

CHAPMAN, Senior Circuit Judge.

Affirmed as modified and remanded by published opinion. Judge WIDENER wrote the majority opinion, in which Senior Judge CHAPMAN joined. Judge HALL wrote a dissenting opinion.

OPINION

WIDENER, Circuit Judge:

Linda Austin filed suit in the United States District Court for the Western District of Virginia against Owens-Brockway Glass Container, Inc., alleging violations of Title VII and the Americans with Disabilities Act (Disabilities Act or ADA). The district court granted summary judgment in favor of Owens-Brockway because Miss Austin failed to submit her claims to mandatory arbitration under a collective bargaining agreement. Miss Austin appeals, claiming that the district court incorrectly held that she was required to arbitrate her statutory claims. Finding no error, we affirm with only slight modification.

I.

Because the district court disposed of Miss Austin's claims on a motion for summary judgment, all justifiable inferences of relevant facts are drawn in favor of the plaintiff. The grant of summary judgment is reviewed *de novo*. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986). Miss Austin worked for Owens-Brockway for approximately 14 years until she was injured on the job in 1992. Her physician released her for light-duty work in August 1992, but Owens-Brockway informed her that no light-duty employment was available. Instead, Miss Austin was put on medical leave and provided with workers' compensation benefits. While Miss Austin was on leave, Owens-Brockway eliminated Miss Austin's job classification

of equipment cleaner/oiler-greaser. In June 1993, Miss Austin met with Robert McCauley, the Director of Industrial Relations at Owens-Brockway. She learned that Owens-Brockway had terminated her employment and that she would not be reassigned to light-duty work.

Miss Austin filed suit against Owens-Brockway on October 13, 1993. She alleged Owens-Brockway violated the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and Title VII, 42 U.S.C. § 2000e *et seq.*, by refusing to offer her light-duty work and by terminating her employment while a male ***878** employee, the only other employee in her eliminated job classification, was reassigned to another position at the plant.

Owens-Brockway filed a motion to dismiss for lack of subject matter jurisdiction. The company argued that Miss Austin failed to file her claim with the EEOC and had not obtained a right to sue letter, both prerequisites to filing Disabilities Act and Title VII claims in court. See 42 U.S.C. §§ 2000e-5(b), 12117(a). Further, Owens-Brockway took the position that Miss Austin's claims were subject to mandatory arbitration under a collective bargaining agreement covering her employment with Owens-Brockway. Because Miss Austin failed to file a claim under the grievance-arbitration procedure, Owens-Brockway maintained that she was precluded from filing suit in federal court.

Owens-Brockway offered affidavits in support of its motion to dismiss, so the district court treated the motion as one for summary judgment. Fed.R.Civ.P. 12(b). The district court found that a significant factual dispute existed as to what actions Miss Austin took to file her complaint with the EEOC, and therefore, without deciding the question, declined to grant summary judgment for failure to file a claim or obtain a right

to sue letter. [1]

The district court granted summary judgment in favor of Owens-Brockway based on Miss Austin's failure to process her claims under the grievance-arbitration procedure in the collective bargaining agreement. The court held that that agreement subjected Miss Austin's claims to mandatory arbitration. Thus, the court held that under *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), because she did not submit her claim to arbitration under the collective bargaining agreement, she was precluded from bringing the lawsuit.

II.

A.

[1] Miss Austin first takes the position that she did not have standing under the collective bargaining agreement to arbitrate her dispute with her employer for gender and disability-based claims of discrimination. The argument goes that having no standing, she could not comply with the contract. She now takes the position that she had been discharged and, as a discharged employee, she had no standing to request or demand arbitration of such claims. There is no merit to this position, however. First, the district court found that the alleged discrimination plaintiff complains of occurred on June 1, 1993, the date the defendant terminated Miss

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[1] Since a valid agreement to arbitrate future disputes effectively ousts a court of jurisdiction, see Big Vein Pocahontas Co. v. Browning, 137 Va. 34, 120 S.E. 247 (1923); Burks Pleading and Practice, § 12 (4th ed. 1952), each of the two defenses asserted here is essentially a plea to the jurisdiction. We need decide only one of them and decide the failure to submit the claim to the grievance-arbitration procedure. The cross-appeal of Owens-Brockway, No. 94-1265, with respect to filing a claim with the EEOC and obtaining a right to sue letter is dismissed without prejudice, and we express no opinion on the question.

Austin's employment. It also found that on June 1, 1993, the April 1, 1993-March 31, 1996 Union Shop Contract was in effect. Plaintiff takes no exception to these findings. So any contractual rights plaintiff may have had on account of that discrimination arose during the term of the collective bargaining agreement in question and plaintiff could assert her rights under that contract. Second, even if plaintiff had been a terminated employee, she could have asserted any rights she had under the collective bargaining agreement even after its termination. *Nolde Bros. Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 97 S.Ct. 1067, 51 L.Ed.2d 300 (1977), affirmed our decision that an employer and employee's "arbitration duties under the [collective bargaining] contract survived its termination with respect to claims arising by reason of the collective bargaining agreement." 430 U.S. at 248, 97 S.Ct. at 1070. *Nolde Bros.* held that a "Union's claim for severance pay under [an] ... expired collective bargaining agreement [was] ... subject to resolution under the arbitration provision of that contract." 430 U.S. at 255, 97 S.Ct. at 1074. We do not think the case before us is different ***879** from *Nolde Bros.* in any significant degree.

Accordingly, we are of opinion and decide that Miss Austin had standing to assert her claims under the collective bargaining agreement.

B.

[2] The next argument of Miss Austin is that arbitration of her Title VII and disability claims is permissive rather than mandatory. She relies on Section 1, Article 32 [*sic*] of the collective bargaining agreement which states that "[a]ll disputes not settled pursuant to the procedures set forth in Article 31, Grievance Procedures, may be referred to arbitration." She takes the position that the use of the word "may" as just stated makes arbitration permissive rather than obligatory. We are of

opinion, however, that the purpose of the word "may" in this section of the collection bargaining agreement is to give an aggrieved party the choice between arbitration and abandonment of his claim, he "may" either arbitrate or abandon the claim. The interpretation urged by Miss Austin would render the arbitration provision meaningless for all practical purposes. If the parties to such an agreement intended for arbitration to be permissive, there would be no reason to include Article 32, the arbitration provision in the contract, for the parties to an existing dispute could always voluntarily submit it to arbitration. Almost identical words ("either party may request arbitration") in a fact situation indistinguishable from that at hand has received the same construction we place upon it by the Eighth Circuit in *Bonnot v. Congress of Independent Unions, Local No. 14*, 331 F.2d 355, 359 (8th Cir. 1964), which followed *Deaton Truck Line, Inc. v. Local Union 612*, 314 F.2d 418, 422 (5th Cir. 1962). See also *American Italian Pasta Co. v. Austin Co.*, 914 F.2d 1103, 1104 (8th Cir. 1990).

Thus, we decide that the arbitration provisions in the collective bargaining agreement are obligatory and not permissive.

III.

A.

[3][4] In deciding whether to enforce the arbitration provision in this collective bargaining agreement, we start with and rely upon the "well- recognized policy of federal labor law favoring arbitration of labor disputes." *Adkins v. Times-World Corp.*, 771 F.2d 829, 831 (4th Cir. 1985), *cert. denied*, 474 U.S. 1109, 106 S.Ct. 896, 88 L.Ed.2d 930 (1986). In the *Steelworkers Trilogy*, the Supreme Court established that arbitration is favored in labor disputes. See e.g., *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363

U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960). We need not rely on the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, in this case because, in this circuit, the FAA is not applicable to labor disputes arising from collective bargaining agreements. *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1067 (4th Cir. 1993).

B.

[5] The collective bargaining agreement specifically provides that claims of gender and disability discrimination are subject to the grievance procedure:

ARTICLE 38

Fair Employment Practice and Equal Opportunities

1. The Company and the Union will comply with all laws preventing discrimination against any employee because of race, color, religion, sex, national origin, age, handicap, or veteran status.

2. This Contract shall be administered in accordance with the applicable provisions of the Americans with Disabilities Act. Before taking action relative to this Section, the Company will meet with the Local Union, and both parties will have sufficient opportunity to express their opinions regarding an anticipated action.

3. Any disputes under this Article as with all other Articles of this Contract ***880** shall be subject to the grievance procedure.

Therefore, Miss Austin contractually agreed to submit her discrimination claims to the grievance procedure.

The grievance procedure specifically provides for binding arbitration.

ARTICLE 32

Arbitration

1. All disputes not settled pursuant to the procedure set forth in Article 31, Grievance Procedure, may be referred to arbitration by a notice given to the company or the union by the other within 10 days after the conclusion of Step 4 of the grievance procedure....

* * * * * *

5. .... The arbitrator's decision shall be final and binding upon both parties.

As we have just demonstrated above, the collective bargaining agreement specifically provides for final and binding arbitration on account of each complaint asserted here: Title VII for the gender claim, and the Disabilities Act for the disability claim. And in part II.B, we have decided that such arbitration is obligatory, not discretionary.

C.

[6] In *Gilmer*, the Supreme Court made clear that agreements to arbitrate statutory claims are enforceable. *Gilmer*, 500 U.S. at 26, 111 S.Ct. at 1652. The *Gilmer* Court recognized that arbitration of a statutory claim is not equal to giving up any right under a statute, it is simply another forum in which to resolve the dispute:

> [B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.

Gilmer, 500 U.S. at 26, 111 S.Ct. at 1652 (quoting *Mitsubishi*

Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 105 S.Ct. 3346, 3354, 87 L.Ed.2d 444 (1985)). *Gilmer* thus rejects the principal concern in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), that arbitration is an "inappropriate forum" for the resolution of Title VII statutory rights. *Alexander*, 415 U.S. at 56, 94 S.Ct. at 1023-24.

Emphasizing its support of arbitration as a method of dispute resolution, the *Gilmer* Court stated:

> [A]ttacks on [the adequacy] of arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."

Gilmer, 500 U.S. at 30, 111 S.Ct. at 1654 (third alteration in original) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481, 109 S.Ct. 1917, 1920, 104 L.Ed.2d 526 (1989)). The Court rejected arguments that arbitration panels may be biased; that limited discovery would hinder a plaintiff attempting to prove discrimination; that lack of a written opinion would result in decreased public awareness of discriminatory employment policies and ineffective appellate review; and that employers and employees have unequal bargaining power. *Gilmer*, 500 U.S. at 30-33, 111 S.Ct. at 1654-56. The Court refused to presume that arbitrators would be biased, *Gilmer*, 500 U.S. at 30, 111 S.Ct. at 1654; explained that choosing arbitration means "trad[ing] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration," *Gilmer*, 500 U.S. at 31, 111 S.Ct. at 1655 (quoting *Mitsubishi*, 473 U.S. at 628, 105 S.Ct. at

3354); noted that judicial review of arbitration awards, although limited, is adequate to ensure compliance with statutory requirements, *Gilmer*, 500 U.S. at 32 n. 4, 111 S.Ct. at 1655 n. 4; refused to decide that lack of class actions should bar arbitration, because individual conciliation should not be barred; and decided that the claim of unequal bargaining power is one that should be decided in individual cases, *Gilmer*, 500 U.S. at 32-33, 111 S.Ct. at 1655-56.

Gilmer further provides that once parties have contracted to arbitrate a statutory matter, the parties should be held to that agreement ***881** unless Congress intended to prohibit arbitration of that matter:

> "[H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." ... If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an "inherent conflict" between arbitration and the [statute's] underlying purposes.

Gilmer, 500 U.S. at 26, 111 S.Ct. at 1652 (quoting *Mitsubishi*, 473 U.S. at 628, 105 S.Ct. at 3354-55).

The language of the statutes could not be any more clear in showing Congressional favor towards arbitration. The Civil Rights Act of 1991, amending Title VII, states:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Pub.L. No. 102-166, § 118, 105 Stat. 1071, 1081. The

Americans with Disabilities Act contains identical language:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under this chapter.

42 U.S.C. § 12212. The meaning of this language is plain--Congress is in favor of arbitration.

A study of the legislative history of the Civil Rights Act and the Disabilities Act also does not reveal Congressional hostility towards arbitration, rather Congress has encouraged arbitration. See H.R.Rep. No. 40(II), 102d Cong., 1st Sess. 78, *reprinted in* 1991 U.S.C.C.A.N. 694, 764; H.R.Rep. No. 40(I), 102d Cong., 1st Sess. 97, *reprinted in* 1991 U.S.C.C.A.N. 549, 635; H.R.Conf.Rep. No. 755, 101st Cong., 2d Sess. (1990); H.R.Conf.Rep. No. 596, 101st Cong., 2d Sess. 89 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 598; H.R.Rep. No. 485(III), 101st Cong., 2d Sess. 76-77, *reprinted in* 1990 U.S.C.C.A.N. 445, 499-500. *Gilmer* provides that we look for a Congressional intent to preclude arbitration of the particular statutory rights. *Gilmer*, 500 U.S. at 26, 111 S.Ct. at 1652. We do not find that intent in the legislative history. In fact, the legislative history for both the Disabilities Act and the Civil Rights Act contains statements that demonstrate the opposite intent:

> This section encourages the use of alternative means of dispute resolution, where appropriate and to the extent authorized by law....
>
> This amendment was adopted to encourage alternative means of dispute resolution that are already authorized by law.

H.R.Conf.Rep. No. 755, 101st Cong., 2d Sess. (1990) (Civil Rights Act); H.R.Rep. No. 485(III), 101st Cong., 2d Sess. 76, *reprinted in* 1990 U.S.C.C.A.N. 445, 499(ADA).

[7][8] Granted, the legislative history of the statutes is not as clear as the statutes themselves that Congress intended to allow arbitration of statutory claims, and one of the conference reports does indicate that arbitration is permissible when voluntary. H.R.Conf.Rep. No. 596, 101st Cong., 2d Sess. 89 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 598 ("It is the intent of the conferees that the use of these alternative dispute resolution procedures is completely voluntary."). In this circuit, conference reports are the most persuasive evidence of legislative intent, after the statute itself. *Davis v. Lukhard*, 788 F.2d 973, 981 (4th Cir.), *cert. denied*, 479 U.S. 868, 107 S.Ct. 231, 93 L.Ed.2d 157 (1986). Furthermore, a committee report states that "voluntary mediation and arbitration are far preferable to prolonged litigation for resolving employment discrimination claims." H.R.Rep. No. 40(II), 102d Cong., 1st Sess. 78, *reprinted in* 1991 U.S.C.C.A.N. 694, 764. Another committee report contains a statement about what that committee "believes" the effect of the statute is, however, that committee's belief is not dispositive of what Congress intended when it enacted the statute. H.R.Rep. No. 40(I), 102d Cong., 1st Sess. 97, *reprinted in* 1991 U.S.C.C.A.N. 549, 635 ("[T]he Committee believes that any agreement to submit disputed issues to arbitration, ... does not preclude the affected person from seeking relief under the enforcement ***882** provisions of Title VII. This view is consistent with ... *Alexander*. ..."). We need not decide what the legislative history means in absolute terms because in our case it means that voluntary agreements to arbitrate statutory claims are allowed. To decide otherwise, we would have to hold that *Gilmer* has no effect at all and that *Alexander* is still the law that statutory claims

cannot be the subject of required arbitration. We do not think Congress intended to return to the old law. Miss Austin's burden under *Gilmer* is to show that Congress intended to preclude arbitration of statutory claims, and she has failed to meet that burden. Even if the provisions of the legislative history are contrary to the statute, the statute must prevail. *Davis v. Lukhard*, 788 F.2d at 981. Especially in that event, the reasoning of Justice Scalia, concurring, in *Thompson v. Thompson*, 484 U.S. 174, 188, 191-192, 108 S.Ct. 513, 520-21, 522, 98 L.Ed.2d 512 (1988), should apply: "Committee reports, floor speeches, and even colloquies between Congressmen, ... [only page references omitted] are frail substitutes for bicameral vote upon the text of a law and its presentment to the President."

Moreover, there is no inherent conflict between arbitration and the underlying purposes of the Disabilities Act or Title VII. Although *Gilmer* involved a claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, the principles behind the Age Discrimination Act are the same as those behind the Disabilities Act and Title VII. The statement of the Court in response to Gilmer's claim that compulsory arbitration would be inconsistent with the purposes of the Age Discrimination Act holds true for any claim that compulsory arbitration would be inconsistent with the policies behind the Disabilities Act and Title VII. The Court replied:

> As Gilmer contends, the ADEA is designed not only to address individual grievances, but also to further important social policies. We do not perceive any inherent inconsistency between those policies, however, and enforcing agreements to arbitrate age discrimination claims. It is true that arbitration focuses on specific disputes between the parties involved. The same can be said, however, of judicial resolution of claims. Both of these dispute resolution mechanisms nevertheless also can further broader social purposes. The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but, as noted above, claims under those statutes are appropriate for arbitration. "[S]o long as the prospective litigant effectively may vindicate[his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."

Gilmer, 500 U.S. at 28, 111 S.Ct. at 1653 (alterations in original) (internal citations omitted) (quoting *Mitsubishi*, 473 U.S. at 637, 105 S.Ct. at 3359). The Court clearly has removed any doubt that age discrimination claims may be arbitrated. We are of opinion that the same reasoning is valid for gender and disability discrimination claims.

D.

Every case decided in the Courts of Appeal under § 118 of the 1991 amendments to the Civil Rights Act has enforced anticipatory agreements to arbitrate claims involving statutory rights.[2] Three federal cases arose

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[2] The dissent relies upon *Tran v. Tran*, 54 F.3d 115 (2d Cir. 1995), for a conflict in the circuits. We think that reliance is misplaced, for *Tran* was a wage and hour case and has few similarities to the case at hand, as we will now discuss.

The first, and a patent difference, is that the wage and hour law, 29 U.S.C. § 201, et seq. (the Fair Labor Standards Act) does not contain any provision encouraging arbitration as does Title VII (§ 118 of the 1991 amendment), and the Disabilities Act (42 U.S.C. § 12212), each of which states that "arbitration is encouraged to resolve disputes arising under" the respective statutes.

If that were not all, the Court has stated in *Gilmer* that "... all statutory claims may not be appropriate for arbitration...." 500 U.S. at 26, 111 S.Ct. at 1652. In *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981), a wage and hour case which involved an arbitration provision in a collective bargaining agreement, the Court declined to require arbitration prior to filing suit, principally on the ground that it had held that "congressionally granted FLSA rights take precedence over conflicting provisions in a collective bargaining compensation arrangement," 450 U.S. at 740-41, 101 S.Ct. at 1445, and followed four of its previous decisions in that respect. 450 U.S. at 741, 101 S.Ct. at 1445. Similarly, as the dissent relies on *McDonald v. West Branch*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984), and *Livadas v. Bradshaw*, 512 U.S. 107, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994), we note that both *McDonald* and *Livadas* are cases under 42 U.S.C. § 1983, and that *McDonald* reasoned that "an arbitration proceeding cannot provide an adequate substitution for a judicial trial." 466 U.S. at 292, 104 S.Ct. at 1804. *Livadas's* reasoning was that "Congress, of course, has given no more indication of any intent to foreclose actions like Livadas's than the sort brought by the cab company [in the *Golden State Transit Corp v. Los Angeles*, 493 U.S. 103, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989) cases]." 512 U.S. at ----, 114 S.Ct. at 2084.

Tran depends on *Barrentine* for its decision that an employee, subject to a collective bargaining agreement with an arbitration procedure, is not required to arbitrate wage and hour claims prior to filing suit under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. With respect to discrimination claims, however, the Supreme Court distinguished *Barrentine* in *Gilmer* itself by stating that "reliance ... is misplaced" "on *Alexander* and its progeny, *Barrentine* ... and *McDonald* ....", for the proposition that would "preclude arbitration of employment discrimination claims." *Gilmer*, 500 U.S. at 33, 111 S.Ct. at 1656. Gilmer continued with regard to the *Alexander* line of cases:

> First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory

in the context of arbitration clauses in employment contracts growing out of securities registration applications. *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991). A fourth federal case arose in the context of an arbitration clause in an ordinary employment contract. *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992). And two state cases also arose in the context of arbitration clauses in employment contracts growing out of securities registration applications. *Benefits Communication Corp. v. Klieforth*, 642 A.2d 1299 (D.C. 1994); *Fletcher v. Kidder, Peabody & Co.*, 81 N.Y.2d 623, 601 N.Y.S.2d 686, 619 N.E.2d 998 (1993), *cert. denied*, 510 U.S. 993, 114 S.Ct. 554, 126 L.Ed.2d 455 (1993).

Bender v. A.G. Edwards & Sons, Inc. involved an

> actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA, which, as discussed above, reflects a "liberal federal policy favoring arbitration agreements."

Gilmer, 500 U.S. at 35, 111 S.Ct. at 1657 (quoting in the last two lines, *Mitsubishi*, 473 U.S. at 625, 105 S.Ct. at 3353). Our case, like *Gilmer*, involves the issue of the enforceability of an agreement to arbitrate statutory claims. This case arises in the context of a collective bargaining agreement so there may be concern for any tension between collective representation and statutory rights. As we find in part III.B, however, Miss Austin is a party to a voluntary agreement which has explicitly agreed to the arbitration of her statutory complaints. That should be enforced. Finally, as noted in part III.A, although we do not rely on the FAA in this case, we do rely on the federal labor law policy encouraging arbitration of labor disputes as expressed in the *Steelworkers Trilogy*.

employee who, in her application for registration as a stock broker, agreed to arbitrate employment disputes. *Bender*, 971 F.2d at 699. When the employee filed a sexual harassment suit in federal court, the employer moved to stay the case pending arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. *Bender*, 971 F.2d at 699. The Eleventh Circuit found, in light of Gilmer, that Title VII claims can be subject to compulsory arbitration and remanded the case with orders that the district court stay federal court proceedings pending the employee's arbitration of her Title VII claim. *Bender*, 971 F.2d at 699, 701.

Willis v. Dean Witter Reynolds, Inc. also involved an employee who agreed to arbitrate employment disputes when she signed a securities registration form. *Willis*, 948 F.2d at 306. When the employee filed state claims of sexual harassment and gender discrimination in a Kentucky court, the employer removed the case to federal court based on diversity jurisdiction. *Willis*, 948 F.2d at 306. The employee then amended her complaint ***884** to include a claim under Title VII. *Willis*, 948 F.2d at 306. The Sixth Circuit noted that the Supreme Court, in *Gilmer*, held enforceable the same arbitration clause at issue in that case. *Willis*, 948 F.2d at 307. The court discussed *Gilmer* 's rejection of the *Alexander* principle that employment discrimination claims could not be arbitrated and *Gilmer*'s support of arbitration as an alternative forum for resolution of disputes involving statutory rights. *Willis*, 948 F.2d at 308-10. The court concluded that the employee's discrimination claim was subject to her agreement to arbitrate. *Willis*, 948 F.2d at 312.

Alford v. Dean Witter Reynolds, Inc., was yet another case in which an employee sued her stock broker employer and alleged a violation of Title VII. *Alford*, 939 F.2d at 229. The case was first decided favorably to *Alford* in the lower courts, but the Supreme Court vacated the judgment of the

Fifth Circuit and remanded the case for consideration in light of *Gilmer*. *Alford*, 939 F.2d at 229. The Fifth Circuit compared Title VII to the Age Discrimination Act, under which the Supreme Court decided *Gilmer*, and concluded that because the civil rights statutes were similar, claims under Title VII could be arbitrated just as claims under the Age Discrimination Act could be arbitrated. *Alford*, 939 F.2d at 230. The court noted *Gilmer*'s rejection of the *Alexander* principle that arbitration was unfavored. *Alford*, 939 F.2d at 230.

Mago v. Shearson Lehman Hutton, Inc. involved an employee who, in her employment application, agreed to arbitrate employment disputes. *Mago*, 956 F.2d at 933-34. When the employee filed a sexual harassment and gender discrimination suit against her employer, the employer moved to stay the case pending compulsory arbitration. *Mago*, 956 F.2d at 934. The Ninth Circuit concluded that the employee did not meet her burden under *Gilmer* of proving that Congress intended to preclude arbitration of Title VII claims and enforced the arbitration agreement. *Mago*, 956 F.2d at 935.

The District of Columbia Court of Appeals also has enforced an anticipatory agreement, in a securities registration application, to arbitrate employment disputes. *Benefits Communication Corp. v. Klieforth*, 642 A.2d 1299 (D.C. 1994). The employee filed a gender discrimination suit in Superior Court prior to the Supreme Court's *Gilmer* decision, and six weeks after *Gilmer* was decided the employer moved to compel arbitration. *Klieforth*, 642 A.2d at 1300. Although the employee's claim arose under the District of Columbia's Human Rights Act, the court explained that it usually looked to federal civil rights cases for guidance in interpreting the Human Rights Act. *Klieforth*, 642 A.2d at 1301-02. The court noted that *Gilmer* held that an agreement

to arbitrate age discrimination claims could be enforced and that every federal court of appeals to decide the issue has extended *Gilmer* to cover Title VII discrimination claims. *Klieforth*, 642 A.2d at 1302 (citing *Bender*, *Mago*, *Willis*, and *Alford*). The court recognized that federal precedent "holds that employment discrimination claims can be subject to arbitration if the employer and employee have agreed to arbitrate disputes of that nature." *Klieforth*, 642 A.2d at 1303. Accordingly, the court found that the arbitration agreement was enforceable. *Klieforth*, 642 A.2d at 1304.[3]

The Court of Appeals of New York has addressed the enforceability of agreements to arbitrate statutory claims, again in the context of employment contracts growing out of securities registration applications, and held that the agreements were enforceable. *Fletcher v. Kidder, Peabody, Co.*, 81 N.Y.2d 623, 601 N.Y.S.2d 686, 619 N.E.2d 998, 1005-06 (1993). *Fletcher* consolidated two cases, one involved a race discrimination claim and the other involved a gender discrimination claim. *Fletcher*, 601 N.Y.S.2d 686, 619 ***885** N.E.2d at 1000. The employees had agreed to arbitrate employment disputes when they signed securities registration applications at their respective firms. One employee filed a race discrimination claim and the other employee filed a gender discrimination claim, and each employer moved to compel arbitration under the respective

[3] The court also found that the 1991 amendments to the Civil Rights Act of 1964 did not modify or overrule *Gilmer*. *Klieforth*, 642 A.2d at 1304. While we agree with the court's statement that the statute on its face "expressly encourage[s]" arbitration as an alternative to litigation, we are not in entire agreement with the statement that it is not necessary to consider the statute's legislative history. *Klieforth*, 642 A.2d at 1305. *Gilmer* names legislative history as a place to look to discover Congressional intent to preclude arbitration of statutory claims. *Gilmer*, 500 U.S. at 26, 111 S.Ct. at 1652.

agreements. *Fletcher*, 601 N.Y.S.2d 686, 619 N.E.2d at 1000. In light of *Gilmer*, the court overruled a prior decision that held that anticipatory agreements to arbitrate employment discrimination claims were not enforceable. *Fletcher*, 601 N.Y.S.2d 686, 619 N.E.2d at 1003. Finding Title VII comparable to the state law under which the case was to be decided, the court analyzed the legislative history of Title VII to find evidence of Congressional intent to prohibit anticipatory agreements to arbitrate statutory disputes. The court found no evidence of any such intent. *Fletcher*, 601 N.Y.S.2d 686, 619 N.E.2d at 1003. The court discussed *Gilmer*'s recognition of arbitration as a favorable method of dispute resolution and stated that after *Gilmer*, the question is "whether Congress, in creating a statutory remedy, intended that arbitration of the statutorily established claim would be foreclosed." *Fletcher*, 601 N.Y.S.2d 686, 619 N.E.2d at 1004.

The only difference between these six cases and this case is that this case arises in the context of a collective bargaining agreement. *Bender*, *Willis*, *Alford*, *Klieforth*, and *Fletcher* arose in the context of employment contracts growing out of securities registration applications, and *Mago* also arose in the context of an employment contract. In all of the cases, however, including the case at hand, the employee attempting to sue had made an agreement to arbitrate employment disputes. Whether the dispute arises under a contract of employment growing out of securities registration application, a simple employment contract, or a collective bargaining agreement, an agreement has yet been made to arbitrate the dispute. So long as the agreement is voluntary, it is valid, and we are of opinion it should be enforced.

E.

[9][10][11] A union has the right and duty to bargain

for the terms and conditions of employment. 29 U.S.C. § 158(d). Through the collective bargaining process, unions may waive the right to strike and other rights protected under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705, 103 S.Ct. 1467, 1475-76, 75 L.Ed.2d 387 (1983). The Supreme Court finds such waivers "valid because they rest on the premise of fair representation." *Metropolitan Edison*, 460 U.S. at 705, 103 S.Ct. at 1476 (citations omitted). There is no reason to distinguish between a union bargaining away the right to strike and a union bargaining for the right to arbitrate. The right to arbitrate is a term or condition of employment, and as such, the union may bargain for this right. This has been the law at least since *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957): "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." *Lincoln Mills*, 353 U.S. at 455, 77 S.Ct. at 917.

F.

[12] Finally, the rule of the Supreme Court and this circuit is that an employee must follow the grievance procedure established by the collective bargaining agreement prior to filing suit in federal court. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652, 85 S.Ct. 614, 616, 13 L.Ed.2d 580 (1965); *Adkins v. Times-World Corp.*, 771 F.2d 829, 832 (4th Cir. 1985), *cert. denied*, 474 U.S. 1109, 106 S.Ct. 896, 88 L.Ed.2d 930 (1986). Thus, an employee cannot sue an employer without first going through the grievance procedure, and this is what Miss Austin is attempting to do. We need not decide any question of union good faith in this case (and none has been suggested), because Miss Austin must pursue her claim under the grievance procedure.

[13] Miss Austin is a party to a voluntary agreement

to submit statutory claims to arbitration. The collective bargaining agreement specifically lists gender and disability discrimination as claims that are subject to arbitration. This voluntary agreement is consistent with the text of Title VII and the ***886** Disabilities Act, the legislative intent behind those statutes, and the purposes of those statutes. Finding that Congress did not intend to preclude arbitration of claims under Title VII and the Disabilities Act, we hold that the arbitration provision in this collective bargaining agreement is enforceable.

IV.

We express no opinion as to whether or not arbitration may now be available or the result thereof. That question is not before us.

We have examined the final order disposing of the case in the district court and are not clear as to whether or not the disposition was without prejudice to the merits of Miss Austin's claim. Since we have affirmed an adjudication that the court could not hear the same because of agreed-upon arbitration, the dismissal of the case should be without prejudice to the merits of the claim asserted. Whether or not Miss Austin has abandoned her claim or otherwise rendered it unenforceable by choosing to attempt to litigate the same rather than arbitrate it is also a question upon which we express no opinion.

On remand, the district court will amend its order dismissing the case to insure it expresses no opinion on the merits of the claim, or whether or not the same is subject to arbitration, or whether or not it may now be so asserted.

The judgment of the district court is accordingly

AFFIRMED AS MODIFIED AND THE CASE IS

REMANDED.

K.K. HALL, Circuit Judge, dissenting:

I respectfully dissent.

After its inventory of cases that follow the holding of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), the majority concludes, "[t]he only difference between these ... cases and this case is that this case arises in the context of a collective bargaining agreement." *Supra* at 885. I agree. The majority fails to recognize, however, that the only difference makes all the difference. A labor union may not prospectively waive a member's individual right to choose a judicial forum for a statutory claim.

I.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), a unanimous Supreme Court held that a person may sue under Title VII notwithstanding that he has submitted his claims to arbitration under a collective bargaining agreement and lost. In reaching this conclusion, the Court stated that an employee's individual statutory right is completely independent of any contractual right he may have under a collective bargaining agreement, and the individual rights of employees are not subject to waiver by their union:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a

> result of the same occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.
>
> * * * * * *
>
> ... [W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. [cites omitted] These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the ***887** collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.
>
> * * * * * *
>
> We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective- bargaining

> agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*.

415 U.S. at 49-52, 59-60, 94 S.Ct. at 1020-21, 1025. Thus, under *Gardner-Denver*, a clause in which a union purported to waive employees' rights to pursue Title VII claims in court would be clearly unenforceable. *Gardner-Denver* was closely adhered to in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981), and *McDonald v. City of West Branch*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984).

II.

Gilmer did not overrule this line of authority. The Supreme Court has said so, twice.

First of all, in *Gilmer* itself, the Court enforced an agreement to arbitrate contained in an individual (not collective) contract between a stockbroker and his employer. Writing for a seven-member majority, Justice White was careful to distinguish *Gardner-Denver*. Though he eschewed language in *Gardner-Denver* that expressed judicial mistrust of arbitration, he left its holding intact. He explained that the collective bargaining agreements in *Gardner-Denver* and its progeny did not contain the agreement of the employees to arbitrate statutory claims. Second, and of central importance here, because labor arbitrations involve contracts negotiated by unions, "[a]n important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case." Finally, *Gilmer*, unlike the labor cases, arose under the Federal Arbitration Act. 500 U.S. at 35, 111 S.Ct. at 1656-57.

In a more recent unanimous decision, the Court reiterated the vitality of *Gardner-Denver*, albeit in dicta:

> In holding that an agreement to arbitrate an Age Discrimination in Employment Act claim is enforceable under the Federal Arbitration Act, *Gilmer* emphasized its basic consistency with our unanimous decision in [*Gardner- Denver*].

Livadas v. Bradshaw, 512 U.S. 107, ---- n. 21, 114 S.Ct. 2068, 2080 n. 21, 129 L.Ed.2d 93 (1994).

Several federal courts have recognized that *Gardner-Denver*, rather than *Gilmer*, continues to govern in the context of collective bargaining agreements. *Tran v. Tran*, 54 F.3d 115, 117, 118 (2nd Cir. 1995); *Humphrey v. Council of Jewish Federations*, 901 F.Supp. 703, 709-710 (S.D.N.Y. 1995); *Jackson v. Quanex Corp.*, 889 F.Supp. 1007, 1010-1011 (E.D.Mich. 1995); *Randolph v. Cooper Industries*, 879 F.Supp. 518, 520-522 (W.D.Pa. 1994); *Block v. Art Iron, Inc.*, 866 F.Supp. 380, 384-387 (N.D.Ind. 1994); *Griffith v. Keystone Steel & Wire Co.*, 858 F.Supp. 802, 804 (C.D.Ill. 1994); *Claps v. Moliterno Stone Sales, Inc.*, 819 F.Supp. 141, 145-147 (D.Conn. 1993). The case first above listed is a decision of the Court of Appeals for the Second Circuit; consequently, the majority's holding will create a split among the circuits.

Gardner-Denver is the law. *Austin* may pursue her contractual remedy, her statutory remedy, or both. The judgment of the district court should be reversed.